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Supreme Court of the United States

October Term, 1950
No. 289

BURNS STEAMSHIP COMPANY,

Petitioner,

against

NATIONAL BULK CARRIERS, INC., as owner of STEAMSHIP NASHBULK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT OF PETITION

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Dated: New York, N. Y.,
August 30, 1950.

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BURNS STEAMSHIP COMPANY,

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NATIONAL BULK CARRIERS, INC., as owner of STEAMSHIP NASHBULK,

Respondent.

CONSOLIDATED CAUSE

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT OF PETITION

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner BURNS STEAMSHIP COMPANY, charterer and operator of STEAMSHIP RUTGERS VICTORY and as bailee of her cargo prays that a writ of certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Second Circuit dated June 23, 1950, in the above entitled consolidated cause.

Opinions Below

The opinion of the United States Court of Appeals is not yet reported and appears at pages 231-240 of the record. The opinion of the District Court is reported in 80 F. Supp. 188 and appears at pages 199-211 of the record.

Statement of the Matter Involved

This cause arose out of a collision on the high seas on September 27, 1946, between STEAMSHIP NASHBULK, owned by National Bulk Carriers, Inc., and STEAMSHIP RUTGERS VICTORY operated by Burns Steamship Company, petitioner. The collision occurred in midafternoon about 225 miles southeast of New York when the sea was calm, the weather clear and visibility good (R. 232).

The NASHBULK, a tanker 542.6 feet long, of 14,164 gross tons, with an 80.2 feet beam, 40.1 feet moulded depth and a 31′ 7″ draft, was bound from Venezuela to Portland, Maine, with a cargo of petroleum products in bulk. She was built in 1945 and was powered by two Westinghouse double reduction steam turbines geared to a single shaft.

The RUTGERS VICTORY, a steamship 439.1 feet long, of 7,607 gross tons, with a 62.1 feet beam, 34.5 feet moulded depth, and a 28′ 5¾″ draft, was bound from Philadelphia to Antwerp with a cargo of coal. She also was built in 1945 and was powered by two General Electric steam turbines geared to a single shaft.

Just before 4:00 P. M. the RUTGERS VICTORY, proceeding on a course of 80° true at a speed of 14½ knots, was sighted by the NASHBULK, which was on a course 356° true and making 16 knots, about seven or eight miles away, four

points on the NASHBULK's port bow. When the bearing of the RUTGERS VICTORY remained constant, the NASHBULK's chief mate at 4:15 P. M. changed from telemotor to manual steering, in accordance with the NASHBULK's master's standing orders to use manual steering when near other vessels or land. At 4:25 P. M., when the ships were about two miles apart, the NASHBULK's chief mate called the master and told him of the approaching vessel, whose bearing continued to be the same, and the master and mate of the NASHBULK kept the RUTGERS VICTORY under observation until after the collision occurred. Until 4:32 P. M., when the vessels were about one-half a mile apart, the NASHBULK kept her course and speed. Then, however, her master, without sounding his whistle, ordered his engines slow ahead and his rudder hard right which caused his vessel to go off three to four points. At about 4:33 P. M., he ordered his engines full speed astern and about ten seconds later [illegible] a three-blast signal (R. 232-3).

The RUTGERS VICTORY's watch officer had left the bridge and was working at a desk in the rear of the wheelhouse. At no time until immediately before the collision did the RUTGERS VICTORY sight the NASHBULK but she continued on without change of course or speed until she heard the NASHBULK's three-blast signal at about 4:33. Her watch officer then went on the bridge and ordered a hard left rudder. The rudder had just begun to take hold when he ordered hard right rudder a few seconds before the collision which occurred in about half a minute after 4:33, the NASHBULK's port bow striking the starboard side of the RUTGERS VICTORY about 175 feet from the latter's stern, at about a 45° angle. Both vessels were damaged and some of the RUTGERS VICTORY's cargo was lost (R. 233).

The District Court and the Court of Appeals by a divided Court (L. Hand, C. J. dissenting) held the RUTGERS VICTORY solely at fault.

Proceedings Below

This case is a consolidation of cross-suits filed in behalf of the owners and operators of the respective vessels in the United States District Court for the Southern District of New York. The cross-suits were tried together and were consolidated upon the entry of the interlocutory decree in the district Court (R. 216-17).

The District Court, although finding that the NASHBULK changed course under a hard right rudder at 4:32 P. M. without sounding any whistle signal as required by Article 28 of the International Rules of Navigation, and although finding that the NASHBULK did not sound any signal of any kind until 23 seconds before the collision, which occurred at 4:33½ P. M., nevertheless exonerated the NASHBULK on the ground that her alteration of course (4 points) at 4:32 P. M. "was not a substantial change of course for a substantial period within the meaning of the Article". (Findings of Fact and Conclusions of Law. R. 213-15).

The Court of Appeals, by a divided court, affirmed the decision and decree of the District Court holding in effect that although the NASHBULK directed her course to starboard, within the meaning of the rule, her admitted failure to sound the required whistle signal was not a fault because of the Court's novel construction of the rule as applying only to vessels that actually know of each other's presence (R. 237). A review is now sought of the judgment entered upon this decision of the Court of Appeals.

Jurisdiction

The jurisdiction of this Court to review the cases arising out of this collision on a writ of certiorari is provided by Title 28, United States Code, Section 1254.

Question Presented

Is a vessel, when altering course which "deliberately" and "unjustifiably" violates the provisions of Article 28 of the International Rules to Prevent Collisions, by altering course without sounding a signal as required by the rules entitled to exoneration from liability for an ensuing collision when it is apparent that a compliance with the requirements of the rule probably would have avoided a collision? (C. C. A. Opinion, R. 237

Reasons for Allowance of Writ of Certiorari

(1) The decision of the United States Court of Appeals for the Second Circuit is in direct conflict with other decisions in the Second Circuit and in other Circuits; also with the decision of this Court in the *Manitoba,* 122 U. S. 97.

(2) The decision of the Court of Appeals is in direct conflict with the English decisions.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued to review the decision and judgment herein of the United States Court of Appeals for the Second Circuit.

BURNS STEAMSHIP COMPANY

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Dated: New York, N. Y., August 30, 1950.

BRIEF IN SUPPORT OF PETITION

FIRST POINT

The decision of the United States Court of Appeals for the Second Circuit is in direct conflict with other decisions of the same Court and of this Court, as well as the English decisions.

The opinion by Chase, C. J., relies upon a decision in the Ninth Circuit, in *Crowley Launch & Tugboat Company* v. *Wilmington Transportation Co.,* 117 F. (2d) 651, a case under the Inland Rules, not International Rules, which are applicable in the instant case. The opinion of Chase, J., referred to but did not follow the English decisions requiring the sounding of a whistle signal, saying:

> "On the other hand at least two English cases, *The Atland,* 76 Lloyd's List, L. R. 38 and *The Jean Jadot,* 75 Lloyd's List L. R. 153, are to the effect that if a signal is required for any reason its probable over-all effect is what counts in determining whether the fault in failing to give it is a contributing cause of a collision" (R. 238).

Learned Hand, C. J., in a dissenting opinion, agreed with the English decisions, saying:

> "Consequently they (Chase J and Clark J.) hold, as I understand them, that if the vessel, to whom the signal should have been addressed, is not aware of the presence of the vessel which should have signalled, the failure to signal does not contribute to the collision. This presupposes that the duty to signal is owed only to ships which are attentive enough to have observed the vessel which should have signalled. I can see no reason so to limit the purpose of the rule, and apparently the English Courts agree that it should not be so limited" (R. 239).

In *The Manitoba,* 122 U. S. 97, this Court, in affirming the decision of the Circuit Court, said:

> "On the facts, the Circuit Court found, as a conclusion of law, and, we think, correctly, that the *Manitoba* was in fault in not indicating her course by her whistle. * * * " (p. 109)

We submit, as we shall show under the following point, that the NASHBULK, having failed to sound a whistle signal when altering course in the presence of another vessel, in violation of Article 28 of the International Rules, has not and clearly cannot prove that had she sounded the required signal the RUTGERS VICTORY would not have taken the steps necessary to avoid collision. As Learned Hand, C. J., said in the dissenting opinion:

> "I do not think that the NASHBULK proved beyond a reasonable doubt that, had she blown, the RUTGERS VICTORY would not have taken the steps necessary to avoid collision; indeed, I am not sure that my brothers disagree as to that! In any event, it is eminently likely that she would have taken them, and it is clear that adequate steps were in fact open to her" (R. 240).

SECOND POINT

The "Nashbulk" was at fault and should be held liable for failing to sound a whistle signal upon altering course in the presence of another vessel in violation of Article 28 of the International Rules.

Article 28 of the International Rules to prevent collisions reads as follows:

> "ARTICLE 28. The words 'short blast' used in this Article shall mean a blast of about one second's duration.

"When vessels are in sight of one another, a steam vessel under way, in taking any course authorized or required by these rules, shall indicate that course by the following signals on her whistle or siren, namely:

One short blast to mean, 'I am directing my course to starboard.'

Two short blasts to mean, 'I am directing my course to port.'

Three short blasts to mean, 'My engines are going at full speed astern.' ". (33 U. S. C. 113.)

Admittedly, the NASHBULK put her rudder hard right at 4:32 P. M., when the RUTGERS VICTORY was in sight bearing four points on the port bow at an estimated distance of ½ mile (Ziskowski R. 109, 111, 121; Opinion, R. 232-3).

Admittedly, the heading of the NASHBULK changed from 3 to 4 points under her hard right rudder before the collision occurred (Ziskowski R. 113, 117, 121; Opinion, R. 233).

Admittedly, no whistle signal of any kind was sounded from the NASHBULK when her rudder was put hard right (Ziskowski R. 109, 121; Opinion R. 233).

This failure to sound a signal constituted a clear, flagrant violation of Article 28 of the International Rules. The NASHBULK's master attempted to defend his failure to sound a one-blast signal by asserting that he was merely changing his "heading" and was not changing his "course" (Ziskowski R. 123-4, 128). The chief officer of the NASHBULK made the same distinction between a change of heading and change of course and even carried it to the point that although a change of "heading" of 180° would turn the ship completely about, yet this would not be a change of "course"

(Warrick R. 157-9). However, he finally realized the absurdity of this contention and he conceded that when in sight of another vessel the rules require that any change of "heading" be announcel by whistle signal (Warrick R. 158-9).

It is clear that when the NASHBULK put her rudder hard right at 4:32 she was "directing (her) course to starboard" whether it be called a change of course or a change of heading. The Court of Apeals so held (R. 236).

If the NASHBULK had sounded a one-blast signal at 4:32 as Article 28 required her to do upon "directing" her course to the right, which was the necessary effect of a hard right rudder, the collision would have been avoided by the alteration of course of the RUTGERS VICTORY to the left. This is graphically shown and mathematically demonstrated by the plots of the two vessels on Exhibit C and the District Court so held as a conclusion of law (R. 215).

The District Court stated in its opinion that under her hard right rudder order at 4:32 P.M., the NASHBULK "turned sharply to starboard" (R. 209) but held that she was under no duty to sound one blast under Article 28 "because this was not a substantial change of course for a substantial period within the meaning of the article" (Conclusions of Law, R. 215). The Court of Appeals disagreed and held that this was a change of course "within the rule" (R. 235-6).

Having admitted a change of course and a deliberate failure to sound a whistle signal, as required by Art. 28, the NASHBULK cannot show that her failure to sound a one-blast signal she altered course under a hard right rudder at 4:32 P. M. was not a contributing cause of the collision because the facts show, both the District Court and Court of Appeals have found, that if she had sounded a signal as

the Rules required her to do, the collision would have been avoided by left rudder action on the part of the RUTGERS VICTORY; the action which the RUTGERS VICTORY in fact took as soon as she did hear the belated whistle signal of the NASHBULK over a full minute after the time when she should have blown and when such a signal would have been effective.

Authorities

In *The Comus*, 19 F. (2d) 774 (C. C. A. 2), STEAMSHIP LAKE FRAMPTON, the privileged vessel in a crossing situation was held at fault and liable for failing to sound a signal when changing course. The Court of Appeals said:

> "Where, on a clear night, two vessels see each other 6 or 7 miles apart, and then come into collision on the wide ocean, there is a heavy burden upon each of them to explain their navigation in an endeavor to exonerate themselves from fault. * * *
>
> The Frampton violated article 28 (Comp. St. §7867), which requires that, when vessels are in sight of one another the steam vessel under way taking any course authorized or required by the rules shall indicate that course by a signal or whistle; that is, one short blast, to mean that she is directing her course to starboard. It is admitted that no whistles were blown by the Frampton when she changed her course about 2 miles away. Since the vessels were navigating on crossing courses, the failure to blow such whistle condemns the navigation of the Frampton. This unannounced change of course contributed to the vessels coming into collision" (p. 776).

In *The Cushing*, 266 Fed. 570, affirmed 292 Fed. 560 (C. C. A. 2) a collision between the CUSHING and the PROTEUS, the PROTEUS hard aported her helm but failed to blow her whistle until midway on her swing under her port helm.

The District Court found that the delay in blowing the whistle was about one minute, for which the PROTEUS was held at fault, Learned Hand, D. J., saying:

> "Such being the facts, as I find them, the fault of the *Proteus* is open and unquestioned. To take but one, *the failure to sound her whistle until midway on her swing cannot be shown not to have contributed to the collision.* For the greater part, perhaps the whole, of the interval between her hard aport helm and her whistle she was still on her course. I have concluded that Bergmann (watch officer of the *Cushing*) failed to act for probably a minute after she in fact put her helm over, and *had he not so waited the collision would not have happened.* If he had got a single blast at once, as he should, it is of course impossible to say that he would not have acted." (pp. 573-4) (Italics ours.)

Upon appeal, 292 Fed. 560, the Court of Appeals affirmed the decision below on the merits saying:

> "The failure of the *Proteus* to sound a signal blast on the whistle to indicate her change of course to starboard was a violation of Article 28 of the rules, and, because it obviously operated to the detriment of the *Cushing* in her navigation, she cannot avoid the consequences of this wrongful maneuvre" (p. 563).

In *The Corozal,* 62 F. Supp. 123, the PIERCE was held at fault for delaying her whistle signal until after the order to alter course. The Court said:

> "Such a delayed warning is not adequate notice of change of course and is not a compliance with the Rule (Article 28)" (p. 126).

In *The James McGee,* 1924 A. M. C. 1413 (S. D. N. Y., not reported in Fed.) the Court (Knox, J.) held the vessel at fault for failing to sound the appropriate whistle signal upon altering course.

In *The Hawaiian-Larchgrove,* 1931 A. M. C. 1987 (S. D. N. Y.), (not officially reported) the Court held the HAWAIIAN at fault for failing to sound a signal when she altered course, saying:

> "Had the HAWAIIAN's lights come on immediately and had she blown her whistle when she ported for the TRESILLIAN, as the rules required her to do, it is quite possible that the LARCHGROVE, close under the TRESILLIAN's port quarter as she was, might have been enabled to navigate in such manner as to avoid collision" (p. 1989).

THE ENGLISH DECISIONS ARE TO THE SAME EFFECT

In *The Atland,* 76 Lloyd's List L. R. 38, Mr. Justice Bucknill said:

> "If the whistle had been sounded two short blasts when the porting was first ordered, those on board the ATLAND would very probably have heard it because the ship was then quite close; they would have woken up to the fact that there was imminent risk of collision, and would have done the right thing then which they did much later—hard-a-starboarded. If they had hard-a-starboarded, say, a minute earlier, there would have been no collision, in my view, * * *" (p. 42) (Italics ours.)

In *The Testbank,* 70 Lloyd's List L. R. 270, on appeal 72 Lloyd's List L. R. 6 the TESTBANK was held at fault for taking helm action without immediately blowing her whistle.

In *The Jean Jadot,* 75 Lloyd's List L. R. 153, Mr. Justice Bucknill said:

> "The only other question in the case is whether it can be said that the failure by the ALEX to sound her whistle had any effect upon the collision. * * *

> * * * The rule says that the whistle must be blown in these circumstances and if the master of a ship is to consider what possible effect his whistle signal may have on those on the ship to which he is blowing, it seems to me to put him in very great difficulty indeed. His duty is to obey the rule. I feel that I should not be justified in holding that the failure to blow that whistle signal did not contribute to the collision. On the contrary, I think it might very well have avoided the collision. Therefore, I must find the ALEX to blame for not sounding that signal" (p. 157).

The master of the NASHBULK testified that his failure to blow was deliberate on the ground that if he had signalled, there was some possibility that it might have confused the RUTGERS VICTORY and caused her to go hard right (Ziskowski R. 124). On the contrary, if the NASHBULK had blown her whistle or if she had reversed her engines as the Rules required her to do, then the only possibility of a collision lay in the remote chance that the RUTGERS VICTORY might have been so foolhardy as to put her rudder right whereas by putting the rudder left, as she in fact did as soon as she heard the NASHBULK's delayed whistle, the collision would have been avoided. The NASHBULK, accordingly sacrificed all of the *probable* courses of action which would have served to avoid collision and her master risked his judgment and the safety of both vessels on the remote possibility that the RUTGERS VICTORY might do the clearly wrong thing. He was not justified in this unwarranted speculation as the Court of Appeals agreed (R. 236).

In *A. H. Bull Steamship Company* v. *U. S.*, 34 F. (2d) 614 (C. C. A. 2), the Court of Appeals said:

> "Masters who choose to divine the purposes of other vessels and keep on, may avoid the charge of overcaution, but they take their chances. If they escape, well and good; if they fail, their owners pay" (p. 616).

See also:

Port Line, Ltd. v. *U. S.*, 181 F. (2d) 365 (C. C. A. 2).

The "Nashbulk", having violated a statutory regulation in failing to announce her change of course by whistle signal has the burden of showing that her failure in this respect could not have contributed to the collision, and that burden has not been sustained.

This is a clear case for the application of the doctrine that a vessel in violation of a statutory rule promulgated to avoid collisions has the burden of showing, in order to escape liability, that her failure to comply with the rule not only might not have been one of the causes of the collision, or that it probably was not a cause, but that it *could not* have been.

In *The Pennsylvania*, 19 Wall. 125, this Court said:

> "But when, as in this case, a ship at the time of the collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been" (p. 136).

As the Court said in *The Corozal*, 62 F. Supp. 123:

> "In view of the position of the two vessels, PIERCE's failure to immediately signal her change of course may well have been a contributory cause of the collision. But at least the PIERCE has not shown that it could not have contributed to the collision as she must do to be excused under the rule of *The Pennsylvania*, 19 Wall. 125" (p. 126).

As to the rule of *The Pennsylvania* (19 Wall 125), Chase, J. referring to Article 18 of the Inland Rules said:

> "She has discharged her burden under the rule of The *Pennsylvania, supra,* co-extensive with her obligation under Article 18" (R. 238).

With this pronouncement Learned Hand, C. J., did not agree (R. 239-240).

THIRD POINT

The "Nashbulk" failed to take timely or appropriate action to avoid collision.

The NASHBULK had the RUTGERS VICTORY under observation for over ½ hour before the collision. During the last 8½ minutes of this period, she was under continuous observation by both the master and chief officer (Ziskowski R. 109, 119; Warrick, R. 156). The bearing of the RUTGERS VICTORY had remained constant at about 4 points on the port bow. As early as 4:15, the chief officer realized that there was danger of collision and this caused him to change over from automatic to manual steering. When he called the master to the bridge at 4:25, he advised him that the bearing had not changed and pointed out that it might be necessary to change course to avoid collision (Warrick R. 152, 155-6). Although both officers kept the RUTGERS VICTORY under observation with the naked eye and with binoculars from 4:25 until the collision at 4:33½ there was no sign of life on board the RUTGERS VICTORY and she gave no indication that she would take any precautions to avoid collision or even that she was aware that the NASHBULK was in the vicinity (Ziskowski R. 109, 113, 119, 121).

It was the clear duty of NASHBULK's navigators to sound a whistle signal to attract the attention of the approaching vessel. No signal of any kind was sounded until the NASHBULK sounded three blasts when the vessels were within seconds of impact.

In similar situations the vessel in the position of the NASHBULK has uniformly been held at fault.

The instant case is strikingly similar to *Yang-Tsze Ins. Ass'n v. Furness, Withy & Co. (The Alleghany-Pomaron)* 215 Fed. 859 (C. C. A. 2). In that case, the POMARON sighted the ALLEGHANY on the port hand about one hour before the collision and kept her under constant observation thereafter. During all this period, the ALLEGHANY had not seen the POMARON at all because her chief officer, who was on watch, had taken his observations and had gone into the chart room to calculate his position. The ALLEGHANY did not discover the POMARON until she had heard her signal. In holding that the collision was due to the faults of both vessels the Court said:

> "The loss of property for which a recovery is sought was due to a collision on the high seas, in broad daylight and in clear weather, and with no other vessels about to embarrass or interfere with navigation. The two vessels involved were steamers, and therefore could be maneuvered more easily than any other kind of vessels. They were in plain sight of each other when miles apart. They nevertheless came into collision and with such force that one of them sank in a few hours, carrying down with her the entire cargo. It is difficult to see how it all happened unless both vessels were in fault and failed to exercise reasonable care. Plain common sense constrains one to such a conclusion. To exonerate either of them under such conditions can be justified only if upon the closest scruitiny of the navigation of each vessel it can be discovered that one of them was free from all culpable blame. We have examined the evidence in the case with care, and we have not been satisfied that either one of these vessels was free from fault. The vessels that navigate the high seas, and indeed vessels that navigate inland waters, intrusted with human lives and property of great value, must be held to the strictest standards of con-

> duct, and when they fail to observe the requirements which the maritime law of the nations has prescribed, are to understand that they must abide the consequences" (pp. 864-65).

In *The Coamo,* 280 Fed. 282 (C. C. A. 2) collision occurred about 8 miles off the New Jersey coast between STEAMSHIP COAMO bound south and a tow of tug ESSEX which was on a crossing course on the COAMO's port hand. The Court of Appeals in holding both vessels at fault said:

> "It is not disputed, nor disputable, that a more inexcusable collision has rarely been presented to any court. It occurred on a fair, clear day, in waters most familiar and then uncrowded, and between vessels which could without difficulty have seen each other for miles, and were (as to tug and steamer) full powered, fully manned, and in perfect repair. These are material facts in considering the probability of collision occurring without mutual fault" (p. 283).

In *The Comus,* 19 F. (2d) 774 (C. C. A. 2) *supra* the Court said:

> "Where, on a clear night, two vessels see each other 6 or 7 miles apart, and then come into collision on the wide ocean, there is a heavy burden upon each of them to explain their navigation in an endeavor to exonerate themselves from fault" (p. 776).

See also:

The West Hartland, 2 F. (2d) 834 (C. C. A. 9).

There is nothing in the International Rules which forbids the sounding of a danger signal and it is clearly permitted by Article 12 which, in conjunction with the Special

Circumstances and General Prudential Rules (Articles 27 and 29) requires the sounding of a danger signal or its equivalent. Article 12 reads as follows:

> "Every vessel may, if necessary in order to attract attention, in addition to the lights which she is by these rules required to carry, show a flare-up light or use any detonation signal which cannot be mistaken for a distress signal" (33 U. S. C. 82).

In "Comparative Rules of the Road and How to Obey Them" published by the United States Coast Guard (Washington 1946) the note under Article 12 reads as follows:

> "Although these signals are optional, they may be effective in attracting the attention of a burdened crossing vessel which fails to do her duty on the high seas, where no other danger signal is provided in the rules" (p. 56).

The Courts also have recognized the necessity of a danger signal as a means of attracting attention although such a signal is optional.

In *The City of Alexandria,* 31 Fed. 427 (S. D. N. Y.) the Court said:

> "While there is no statute nor regulation that in terms requires a tow thus situated to give such signals, there is none that forbids it; and every vessel is bound by the general maritime law, as is recognized by the provisions of article 24 of the new rules, to give such reasonable notice of obvious danger as the special circumstances may require, and such as are easily within her power to give" (p. 430).

CONCLUSION

A writ of certiorari should be issued in accordance with the prayer of the foregoing petition.

Respectfully submitted,

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Dated: New York, N. Y.,
August 30, 1950.

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CHARLES ELMORE CROPLI
CLER

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950
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BURNS STEAMSHIP COMPANY,
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Respondent.

CONSOLIDATED CAUSE.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1950

No. 289

BURNS STEAMSHIP COMPANY,

Petitioner,

against

NATIONAL BULK CARRIERS, INC., as owner of STEAMSHIP NASHBULK,

Respondent.

CONSOLIDATED CAUSE.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.

The present case is one in which justice has clearly been done and which rests basically on issues of fact.

The case involves a collision on the high seas between the "Nashbulk" and "Rutgers Victory", which came together on crossing courses. The "Rutgers Victory", the burdened vessel, not only made no effort whatever to obey the navigation rules and keep out of the way of the "Nashbulk", but was not even aware of the presence of the "Nashbulk", since for a long time preceding the collision she had been maintaining no lookout of any kind. The "Nashbulk", on the other hand, maintained an alert lookout and when the vessels reached a position where, in the judgment of

her master, the burdened vessel could not avoid collision by her action alone, the "Nashbulk" took prompt and vigorous action to check her own headway and very nearly succeeded in preventing the collision. Indeed had not the "Rutgers Victory" imprudently checked her headway, first by a hard left rudder and then by a hard right rudder in the last half minute before collision, it is even possible that no collision would have occurred.

The district judge who, as a Naval officer, had had practical experience as a navigator, drafted his own findings of fact and conclusions of law. Those findings and conclusions (R. pp. 212-15), give an accurate outline of the evidence and the factual conclusions supported by the evidence.

The trial judge found, and the evidence amply supported his findings, that the "Rutgers Victory" was guilty of the grossest negligence, and that the "Nashbulk" was prudently navigated, that she was guilty of no violation of the rules, and that even if she had been guilty of a violation such violation would have been excused as committed *in extremis*.

The opinions of the Court of Appeals judges, without discussing the evidence, take the view that the manoeuvre of slow ahead-hard right rudder, made about a minute and a half before collision in order to check the headway of the "Nashbulk", called for the blowing of a one whistle signal, since it caused a change of heading. The prevailing opinion held, however, that the failure to blow the one whistle signal could not have contributed to the collision since the navigators of the "Rutgers Victory" did not know of her presence and were not navigating with reference to her course. The dissenting judge, believing that the swinging of the "Nashbulk's" head to starboard called for a one whistle signal, dissented from the conclusion that the failure could not have contributed to the collision. He states in his opinion, however:

"An equal division of damages in this case would be plainly unjust; they ought to be divided in some such proportion as five to one" (R. p. 238).

II.

Alleged question presented—issue of whistle signal.

Petitioner's brief makes an entirely erroneous presentation of the issue of the failure to blow a one whistle signal. The issue was not whether a 5° change of course or a 90° change of course calls for the blowing of a whistle signal. The issue was whether the manoeuvre of slow ahead-hard right rudder taken solely to check the headway of the vessel preliminary to and in fact followed within less than a full minute (R. p. 110; fol. 330; p. 124, fol. 372) by full speed astern, presented a situation calling for a whistle signal to indicate "I am directing my course to starboard". No doubt the vessel's head fell off to starboard and the falling off was accentuated by the backing. The forging ahead of the vessel in a partly sideways position was intended to be and was actually the most effective means of checking her speed (R. pp. 63-4; fols. 187-90).

III.

The alleged conflict of decisions.

According to the view of the majority of the Court of Appeals, since neither the change of course (Respondent does not admit there was a change of course) nor the failure to announce that change of course could have been a contributing cause to the collision, the fact that the blowing of a whistle might have served a useful purpose as an alerting signal, when an alerting signal was not authorized

or required, did not render it a contributing fault. That view, Petitioner urges, is in conflict with other decisions.

Certainly the majority decision is in accord with the Ninth Circuit Court of Appeals decision in *Crowley Launch & T. Co.* v. *Wilmington Transp. Co.*, 117 F. (2d) 651, cited and quoted in the opinion (R. 236).

The decision of this court in *The Manitoba*, 122 U. S. 97, referred to on pages 5 and 7 of the petition and brief, has no bearing upon the question under consideration. In that case vessels were meeting very nearly head to head on courses almost parallel. It was necessary for each vessel to announce by whistle the side on which she proposed to pass the other, and the failure to blow the necessary passing signals to indicate the courses which the vessels were taking was the direct cause of the collision.

None of the Second Circuit Court cases presents a conflict. In *The Comus*, 19 F. (2d) 774 (Brief, p. 10), the holding-on vessel in a crossing course situation failed in her duty to hold her course and speed, making a premature unannounced course change.

The case of *The Cushing*, 266 Fed. 570 (Petitioner's Brief, pp. 10-11) was a substantially head and head situation under blacked-out war conditions, in which an unnecessary and unannounced change of course by one of the vessels was the direct cause of the collision.

The *Corozel*, 62 F. Supp. 123 (Petitioner's Brief, p. 11) and *The Hawaiian-Larchgrove*, 1931 A. M. C. 1987 (Petitioner's Brief, p. 12) both likewise involved cases of vessels meeting substantially head and head, where the unannounced alteration of course contributed directly to the collision.

The English cases cited in Petitioner's brief (p. 12) involved facts bearing no relation to the present case. The case of *The Testbank*, 70 Lloyd's List L. R. 270, like the

case of *The Cushing, supra,* involved vessels approaching head and head under blacked-out war conditions in which an unnecessary and unannounced change of course by one of the vessels was a direct cause of the collision. The cases of *The Atland,* 76 Lloyd's List L. R. 38 and *The Jean Jadot,* 75 Lloyd's List L. R. 153, cited in the Court of Appeals decision in the present case, were both lower court decisions and were decided by the same judge. They involved vessels proceeding in substantially the same direction in blacked-out convoys where even small changes of course made in close quarters for the purpose of reducing the danger of collision, were of extreme importance. The language of Mr. Justice Bucknill in those two cases must be considered in the light of the facts which the court had under consideration.

In both *The Atland* and *The Jean Jadot* cases *supra,* Mr. Justice Bucknill regarded the vessels which were criticized for omitting to blow a whistle signal, as being guilty of a minor fault only, and under the English rule of apportionment held those vessels responsible in each case for only one-fifth of the damages resulting from the collision. Had the English rule of unequal apportionment not been available to him and had he been applying the American rule of major and minor faults it is highly improbable that any liability would have been predicated upon the minor fault.

IV.

The District Court was correct in finding that the fault, if any, committed by the "Nashbulk", was a fault *in extremis*.

The District Court found both as a Finding of Fact and a Conclusion of Law that the "Nashbulk" was placed in a position *in extremis* when she was called upon to take emergency action to avoid the collision (Finding 15, R. 214; Conclusion 3, R. 215). That Finding and Conclusion were amply supported by the evidence and were entirely consistent with previous judicial decisions.

Wilson v. *Pacific S. S. Co.*, 276 U. S. 454;
The Gulfstar, 136 F. (2d) 461 (3 C. A.);
The Pacific-Atlantic Steamship Co. v. *United States*, 63 F. (2d) 414 (9 C. A.);
The Binghamton, 271 Fed. 69 (2 C. A.) cert. denied 255 U. S. 575.

The Court of Appeals majority opinion contains a dictum that the "Nashbulk" could not be regarded as *in extremis* since for a long time her navigators had known that if the burdened vessel failed to take proper avoiding action they might be required to act, apparently overlooking the fact that what action they might be required to take could not be determined until at the very last moment they learned what action the burdened vessel was then taking or failing to take. The cases cited in the Court of Appeals opinion do not support that court's view.

Two of the cases cited by the court, namely, *The Favorita*, 85 U. S. 598 and *Publicover* v. *Alcoa S. S. Co.*, 168 F. (2d) 672, are examples of the principle that a vessel which, by its own negligent navigation has created a situation of peril, cannot rely upon the defense of *in extremis* although the other vessel can. In the third case cited,

namely, *The Queen Elizabeth,* 122 Fed. 406 (cert. denied 190 U. S. 560), the holding-on vessel, the "Queen Elizabeth", was held to have been placed in a position *in extremis* by the burdened vessel, the "Birdsall", notwithstanding the fact that the navigators of the "Queen Elizabeth" had been carefully observing the "Birdsall's" light from a distance of several miles (see p. 409, middle).

This court in its opinion in the crossing course case of *Wilson* v. *Pacific S. S. Co.,* 276 U. S. 454, upheld the contention of counsel for the "Svea" that the "Svea" found herself in a position *in extremis* when collision was imminent, notwithstanding the fact that she had had the burdened vessel under observation for a long time. This court said:

> "If in the difficult circumstances forced upon him her navigator, whose qualifications are not questioned, exercised his best judgment in not departing therefrom, the burdened vessel must accept the consequences. Having driven him into a perplexing situation, the Newport cannot complain because he failed to make the most judicious choice between the hazards presented" (276 U. S. pp. 461-2).

V.

No alerting signal was appropriate.

Petitioner's brief apparently suggests (pp. 17-18) that the "Nashbulk" was under some indefinite duty to alert the "Rutgers Victory" even during the time when the latter vessel continued to have an opportunity to obey the rules and avoid the collision by her own action alone. No support for that contention was given by either of the lower courts and it is without foundation. The International Rules place a rigid duty upon the holding-on vessel to maintain her course and speed and upon the giving-way vessel to keep out of the way. The only whistle signals authorized

by the International Rules (as distinguished from the Inland Rules) are those provided in Article 28 to indicate course changes or the backing of the engines.

The point of view of the practical navigator is well expressed in an article appearing in the June 1947 issue of the publication entitled "Proceedings of the Merchant Marine Council, United States Coast Guard" (published monthly at Coast Guard Headquarters, Washington 25, D. C.) in which the following statement is made with respect to the instant situation at page 104:

> "In cases of this sort and there have been a number of them, very little sympathy can be given to the officer in charge of the burdened vessel. The officer who is in real need of sympathy is the master of the privileged vessel as he must hold his course and speed and trust to the grace of God and good luck that the other fellow is maintaining a proper lookout as required by the law."

VI.

Justice has very clearly been done by the lower courts and the fault, if any, of the "Nashbulk" is of such a minor nature that it should be disregarded under the minor fault rule.

> *The City of New York,* 147 U. S. 72;
> *The Victory and The Plymothian,* 168 U. S. 410;
> *The Oregon,* 158 U. S. 186;
> *The Great Republic,* 23 Wall. 20.

In the oft-quoted language of this court in "The City of New York", *supra*:

> "Where fault on the part of one vessel is established by uncontradicted testimony and such fault is, of itself, sufficient to account for the disaster, it is

> not enough for such vessel to raise a doubt with regard to the management of the other vessel" (147 U. S. at p. 85).

More emphatic still is the following statement of this court appearing in *The Victory and The Plymothian, supra*:

> "The recognized doctrine is thus stated by Mr. Justice Brown in *The Umbria*, 166 U. S. 404, 409: 'Indeed so gross was the fault of the Umbria in this connection that we should unhesitatingly apply the rule laid down in *The City of New York*, 147 U. S. 72, 85, and *The Ludvig Holberg*, 157 U. S. 60, 71, that any doubts regarding the management of the other vessel, *or the contribution of her faults,** if any, to the collision, should be resolved in her favor' " (168 U. S. at p. 423).

In *The Oregon, supra,* a technical violation of the rule applicable to the height of the "Oregon's" anchor light above her hull was held not to have been a contributing cause to the collision even though her light was mistaken for the Coffin Rock Light (158 U. S. at p. 198).

In *The Great Republic, supra,* this court said:

> "It is pretty clear that the Cleona did not blow her whistle for each boat to keep to the right, as soon as he started for the opposite shore. This omission was a fault, but this fault bears so little proportion to the many faults of the Republic, that we do not think, under the circumstances, the Cleona should share the consequences of this collision with the Republic" (p. 35).

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* Italics ours.

CONCLUSION

The petition for a writ of certiorari should be denied.

JOHN C. PRIZER,
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Dated New York, October 9, 1950.